

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK WILLIAM MCNEES,

Defendant-Appellant.

UNPUBLISHED

June 17, 2003

No. 238743

Calhoun Circuit Court

LC No. 01-002732-FH

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a), for which he was sentenced to thirty months to fifteen years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We find no abuse of discretion in the trial court's decision to exclude evidence regarding defendant's belief as to the victim's age. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). A defendant's reasonable mistake as to the victim's age is not a defense to third-degree CSC. *People v Cash*, 419 Mich 230, 234, 246; 351 NW2d 822 (1984). Additionally, because jury nullification is not a recognized legal defense and because defendant's belief about the victim's age is irrelevant for purposes of his conviction, the court could exclude the jury nullification evidence. See, generally, *People v Demers*, 195 Mich App 205, 207-208; 489 NW2d 173 (1992).

Upon review, we find no evidence to support defendant's claim of ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Jury nullification is not a defense on which the jury may be instructed, *Demers, supra* at 208; *People v St Cyr*, 129 Mich App 471, 473-474; 341 NW2d 533 (1983), and defense counsel was not ineffective for failing to advocate a meritless position. *Snider, supra* at 425. Likewise, counsel was not ineffective for failing to request an instruction on a lesser included charge of attempted third-degree CSC because such an instruction was not supported by a rational view of the evidence. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002).

We find nothing improper in the prosecutor's closing argument. He did no more than express an opinion that the evidence presented proved beyond a reasonable doubt that defendant

was guilty of the crime charged. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970). Defendant was not denied a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

The trial court properly scored offense variable (OV) 4, MCL 777.34, because the presentence report indicated that the victim had suffered psychological injury and counseling was being considered. Thus the evidence supported the score, and it should be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); *People v Elliot*, 215 Mich App 259, 260; 544 NW2d 748 (1996). Assuming without deciding that the court erred in scoring OV 10, MCL 777.40, reducing defendant's OV score by ten points would not change his OV level, MCL 777.63, and the guidelines range would be unchanged. Because defendant's minimum sentence of thirty months was within the appropriate guidelines range, any error was harmless, and his sentence must be affirmed. MCL 769.34(10); *People v Ratkov (After Remand)*, 201 Mich App 123, 127; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994).

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette